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# State v. Gable Appellant's Brief Dckt. 43767

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 43767
	)	
v.	)	ADA COUNTY NO. CR 2005-245
	)	
MARK WESLEY GABLE,	)	
	)	APPELLANT'S BRIEF
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Mark Wesley Gable appeals from the district court's order denying his motion pursuant to Idaho Criminal Rule 35(a) ("Rule 35") for correction of illegal sentence. He contends the district court abused its discretion when it denied his Rule 35 motion.

Statement of Facts and Course of Proceedings

Following a jury trial, Mr. Gable was convicted of three counts of aiding and abetting burglary and one count of conspiracy to traffic in methamphetamine. (R., pp.30, 86.) The district court sentenced Mr. Gable to a unified sentence of 30 years, with 20 years fixed. (R., p.30.) The judgment was entered on October 26, 2005. (R., p.30.) Mr. Gable filed a timely notice of appeal, and the Court of Appeals affirmed

the judgment and sentence in an unpublished opinion, dated October 16, 2007. (R., p.30.) Mr. Gable filed a timely application for post-conviction relief, which the district court summarily dismissed following an evidentiary hearing on Mr. Gable's claim that he received ineffective assistance of counsel. See *Gable v. State*, No. 36233, 2010 WL 9587352, at \*1-2 (Idaho Ct. App. June 22, 2010) (unpublished). Mr. Gable appealed, and the Court of Appeals affirmed. See *id.* at \*7.

On July 18, 2011, Mr. Gable filed a pro se motion pursuant to Idaho Criminal Rule 34 ("Rule 34") for a new trial. (R., pp.7-11.) The district court denied Mr. Gable's Rule 34 motion on July 20, 2011, concluding the motion was untimely. (R., pp.30-31.)

On October 29, 2015, Mr. Gable filed a pro se Rule 35 motion for correction of illegal sentence and a motion for appointment of counsel. (R., pp.32-86, 105-08.) The State filed an objection to Mr. Gable's Rule 35 motion and Mr. Gable filed a response to the State's objection. (R., pp.115-18, 119-21.) On November 23, 2015, the district court issued an order denying Mr. Gable's Rule 35 motion and denying his motion for appointment of counsel. (R., pp.122-25.) Mr. Gable filed a timely notice of appeal on December 2, 2015. (R., pp.126-29.)

### ISSUE

Did the district court abuse its discretion when it denied Mr. Gable's Rule 35 motion?

## ARGUMENT

### The District Court Abused Its Discretion When It Denied Mr. Gable's Rule 35 Motion

Mr. Gable contends the district court erred when it denied his Rule 35 motion and failed to correct his illegal sentence. Idaho Criminal Rule 35(a) provides that “[t]he court may correct a sentence that is illegal from the face of the record at any time.” Whether a sentence is illegal is a question of law over which this Court exercises free review. See *State v. Farwell*, 144 Idaho 732, 735 (2007). Mr. Gable asserts that the district court lacked subject matter jurisdiction because the traffic stop which led to his arrest was supported by neither reasonable suspicion nor probable cause, and his sentence is thus illegal. (R., p.33.)

At Mr. Gable's trial, counsel for Mr. Gable candidly acknowledged that he should have filed a pre-trial motion to suppress challenging the legality of the traffic stop. (R., p.79.) Counsel for Mr. Gable questioned the purported reason for the stop—possible child endangerment—because testimony at trial indicated the police officer who conducted the stop knew the baby carrier thrown in the back of Mr. Gable's vehicle contained a doll, not a baby. (R., pp.33, 82.) The district court considered Mr. Gable's mid-trial motion to suppress, notwithstanding its untimeliness, and held that the stop did not violate Mr. Gable's rights under the Fourth Amendment because it was supported by reasonable suspicion of shoplifting.<sup>1</sup> (R., pp.80, 84.) Mindful of *State v. Clements*, 148 Idaho 82, 87 (2009), Mr. Gable contends the district court should have held an

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<sup>1</sup> In affirming the summary dismissal of Mr. Gable's application for post-conviction relief, the Court of Appeals likewise concluded “a review of the facts reveals that the officers had reasonable, articulable suspicion that [Mr.] Gable had been, or was about to be, engaged in shoplifting.” *Gable*, 2010 WL 9587352, at \*4.

evidentiary hearing on his Rule 35 motion to consider whether the traffic stop was legal, and whether the district court had subject matter jurisdiction.

CONCLUSION

Mr. Gable requests that this Court vacate the district court's order denying his Rule 35 motion and remand with instructions to grant that motion.

DATED this 25<sup>th</sup> day of March, 2016.

/s/ \_\_\_\_\_  
ANDREA W. REYNOLDS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25<sup>th</sup> day of March, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MARK WESLEY GABLE  
INMATE #79562  
ISCC  
PO BOX 70010  
BOISE ID 83707

SAMUEL A HOAGLAND  
ADA COUNTY COURTHOUSE  
DELIVERED VIA EMAIL

KENNETH K JORGENSE  
DEPUTY ATTORNEY GENERAL  
DELIVERED VIA EMAIL

/s/ \_\_\_\_\_  
MAGALI CEJA  
Administrative Assistant

AWR/mc